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No. 80-2158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ISADORE SPIEGEL, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY MEMORANDUM

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I

THE SOLICITOR GENERAL CONCEDES THAT (1) THE ISSUE IS IMPORTANT AND (2) THERE IS A CONFLICT IN THE CIRCUITS

The concluding paragraph of the Solicitor General's Brief in Opposition concedes (p. 11)

> that this case does involve an issue of considerable importance.

The same paragraph also acknowledges (p. 11)

> the incipient emergence of a conflict among the circuits . . . .

Specifically, the Solicitor General agrees (pp. 9-10) that the decision below conflicts with the "unequivocal statement of the law" expressed by the Fifth Circuit in *United States* v. *Davis*, 636 F.2d 1028, 1042-44 (5th Cir. 1981). The Solicitor General asserts (p. 11), however, that the Fifth Circuit "openly questioned" in its *Davis* opinion the logic of its own holding in *Davis*, and that this makes it "premature" for this Court to consider the issue in the present case. The Solicitor General's assertion is, however, erroneous in light of more recent Fifth Circuit law.

II

THE FIFTH CIRCUIT HAS REAFFIRMED ITS "UNEQUIVOCAL STATEMENT" IN A MORE RECENT DECISION

In re Grand Jury Subpoena (Kent), 646 F.2d 963 (5th Cir. 1981),[1] involved grand jury subpoenas for the business records of a sole proprietorship having offices in Texas and California. Citing earlier Fifth Circuit rulings, the court of appeals held in *Kent* (646 F.2d at 968):

> that a sole proprietor's fifth amendment privilege against self-incrimination protects the "non-required" records of the proprietorship from com-

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[1] *Kent* was decided by a panel of Administrative Unit B of the Fifth Circuit, and *Davis* by a panel of Administrative Unit A. On October 1, 1981, Administrative Unit B will officially become the new Court of Appeals for the Eleventh Circuit, while Unit A will remain as the Fifth Circuit. Thus, when the new circuit is formed, both the Fifth and Eleventh Circuits will presumably follow their respective precedent and continue to hold a sole proprietor's business records protected by the Fifth Amendment.

pelled production in response to a grand jury subpoena directed to the sole proprietor.

Kent was a significantly weaker case for assertion of the Fifth Amendment privilege than is this case for at least two reasons:

First, Kent involved solely business records of an active ongoing commercial enterprise. In the present case, the evidence is undisputed (and the Solicitor General concedes) that the subpoenaed records include the petitioner's personal financial documents as well as those of his sole proprietorship (Br. in Opp., p. 2).

Second, in the *Kent* case a subpoena was also served upon the comptroller of the sole proprietorship, who had access to the subpoenaed records. The government argued in *Kent,* as it has done here, that the proprietor of a business is not compelled to authenticate his records and thereby engage in testimonial self-incrimination if the subpoena can be executed by some employee, such as the comptroller. The Fifth Circuit rejected that argument, finding that the individual proprietor had always retained control of his records, even if he had allowed his employees access to them for business purposes. The Fifth Circuit held that to permit the subpoena to be enforced if served on an employee with such access "would . . . be to honor form over substance and to render meaningless Kent's fifth amendment privilege." 646 F.2d at 969. That conclusion applies *a fortiori* to this case, where it is conceded that petitioner has always been the sole custodian of the records in question (Br. in Opp., p. 2) and where no other employee has been subpoenaed.

III

THE SOLICITOR GENERAL SHOULD NOT BE PERMITTED TO SELECT WHICH CASE WILL BE HEARD BY THIS COURT TO RESOLVE AN EXISTING CONFLICT

Since the question is important and recurring and since there is no real doubt as to the existence of a conflict,[2] the standards prescribed by this Court's Rules 17.1(a) and 17.1(c) have been met, and the writ of certiorari should be granted. The Solicitor General's assertion that it is "premature" to grant certiorari appears to be a tactical choice by the government to select a more appealing factual context in which to secure the ruling the government would like on the question reserved by this Court in *Fisher* v. *United States*, 425 U.S. 391, 414 (1976). The government would prefer, no doubt, to have the issue decided in a case involving a very large sole proprietorship, where no personal documents of any kind are sought by the subpoena, rather than on the facts of this case. In the meantime, the government is prepared to leave the lower courts in doubt, to permit subpoenas to be enforced differently in different parts of the country, and to subject individuals to substantial uncertainty regarding their constitutional rights. This Court should not permit the Solicitor General to control the Court's

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[2] Indeed, footnote 1 of the Second Circuit's August 7, 1981 decision in *In re Grand Jury Subpoena Dues Tecum Dated April 23, 1981*, No. 81-6086, indicates that the Second Circuit also reads its earlier opinions as barring enforcement of a subpoena which calls for "production" of non-corporate records, even without oral testimony, on the ground that "such production does constitute testimony and if compelled will violate the Fifth Amendment." Slip op. at 4530 n.1. Compare Br. in Opp., pp. 7-8.

docket in this manner and should not foster the continuing uncertainty which results from what the Solicitor General calls "the incipient emergence of a conflict" (Br. in Opp., p. 11).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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